IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

Nos. 72 and 451.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,

Appellants

vs.

JOHN E. ROLLER,

Intervenor.

JOHN E. ROLLER, *Intervenor,*

Appellant

vs.

ALLEN C. CLARK, SARAH P. CLARK, AND BARTOW L. WALKER.

MOTION FOR REHEARING OR FURTHER MODIFICATION OF DECREE.

LEO SIMMONS,
Attorney for Appellant.

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Now comes the appellants and move the court to further modify the decree appealed from in this case, so that the trial court may pass upon the title of the appellee, Roller, and that of the appellants and other ten-

ants in common; or if the court is of the opinion that this should not be done, to further modify the decree so that issues may be framed, by the trial court, and sent to a jury for trial, in order to avoid beginning a new proceeding, and, if necessary, to grant a rehearing for that purpose.

ARGUMENT IN SUPPORT OF MOTION.

Roller is not a resident of the District of Columbia, and service cannot be had on him in an action of ejectment; see his own statement as to this fact (Rec., p. 8).

It appears from the record (Rec., p. 8) that Roller was allowed to intervene upon his own petition; that he claimed the sole ownership of the property (Rec., p. 8 and 9); that he afterwards filed an answer to the bill of complaint and asked the court to "Quiet him in his title and ownership of the property, and to enjoin the complainants and all parties to this suit from in any way claiming title to the premises, etc."

Clearly this was a cross petition in its nature, such as would be set forth in a cross bill. He never has intimated in any of his pleadings a desire that the case be tried by an action of ejectment. The Court of Appeals so found. (See opinion 19, App. D. C.)

He having entered into the case and prayed specific relief, the complainants and the other tenants in common had a right to assume that the whole question of title would be litigated and settled in the suit.

Such being the case, they proceeded to prove their title in a manner satisfactorily, not only to the court, but to Roller himself; for it will be seen by Roller's stipulation (Rec., p. 29) that the whole title of the appellants, which

includes proof of heirship, tracing title into the parties, was fully proven.

It further appears from Roller's second petition to intervene (Rec., p. 100; see p. 102) he asked for leave to introduce further testimony, etc. His whole intention and whole aim seems to be to litigate his title and that the whole matter should be settled in the suit pending.

The decree of the late Mr. Justice Cox, holding that the court did not have jurisdiction over Roller was necessarily erroneous, and inasmuch as this court holds that none of the decrees were final, there seems to be no reason why the whole question should not be litigated and settled in this case without requiring the appellants to resort to an action of ejectment.

Undoubtedly, if the court had jurisdiction at all over Roller, that is to say, if it could give him any relief, it would have the right to pass a decree adverse to him. It certainly cannot be said that the court has jurisdiction to pass a decree in favor of a person and yet not have jurisdiction to pass one adverse. This would be tantemount to tying the hand of one party and giving the other a club, so to speak.

For certainly as Roller brought himself into the case as a litigant, he placed himself in position to have a decree passed against him, as well as to have one passed in his favor.

Take the position this decree will leave the parties; Roller is a non-resident of the District of Columbia, as before stated (see his petition setting forth that he is a citizen of Virginia (Rec., p. 8). The evidence (see Walker's and Roller's testimony) clearly shows that the parties claiming as tenants in common were in possession of the property. Suppose, by chance, Roller could not be found

in the District, it would be impossible to bring an action of ejectment against him, even as a claimant, because service by publication could not be had in such a case. Moreover, Roller is and was at the begining of this suit, the attorney and legal adviser of the heirs of James Ward Scott, parties to this suit, who owned one-fifth of the record title (see Roller's own statement to this effect (Rec., p. 40); certainly he would prevent them from suing him.

It seems that the court has overlooked these facts, which clearly show that the only remedy the appellants had in this case was to proceed as they did.

If the court's opinion, that the plaintiffs should settle their title at law before they can have partition, is to stand, it seems that there is no good reason why the complainants and the other tenants in common should be required to again prove their record title in an action of ejectment, even if it is possible to get service on an adverse party, against whom they have already proved their title, not only to the satisfaction of the court, but to such party himself.

It must appear to the court that the proof of heirship in this case was not only troublesome, but an expensive undertaking. Roller had full opportunity to cross-examine witnesses and object to the evidence. He asked to have the whole question of title duly adjusted and settled in the equity suit, and why should more be required?

This seems a most remarkable case.

A non-resident party, claiming title under a deed void upon its face, representing parties owning one-fifth of an adverse title, comes into a suit for partition between tenants in common, holding a record title (he admits this, see Roller's answer and stipulation) requesting that he be allowed to litigate his title and have the question settled.

The court holds that the tenants in common who claim the record title shall not proceed until they begin an action of ejectment against this a non-resident, and attorney for some of them, and establish their title at law.

Suppose we reverse the situation. Suppose Roller claimed an undivided interest under the tax deed and begun suit for partition against his co-tenants, and supposing parties claimed the record title prayed leave to intervene in the suit, as Roller did in this case, would the court have entertained their petition at all.

What becomes of the well-known principle that equity will not entertain a bill in favor of a party who has a plain remedy at law, if such is the case?

The question of jurisdiction over Roller, if he had any right in the case at all cannot be doubted. For if he had any right in the case and the court took jurisdiction over him, which was necessary in order to grant him any relief at all, it necessarily had jurisdiction to grant a decree against him. The rule of laches, as I understand, is usually applied to a complainant who has slept upon his rights, but it cannot and should never be applied when a person is defending.

I respectfully submit to the court that this decree should be so modified as to require the trial court to settle the rights of the parties. Inasmuch as the court is of the opinion that Roller has a standing in the case, if he has a title he should have such decree as he prays, if not, it should be so decided.

If the court thinks this should not be, and that the parties should settle their title at law, then I respectfully submit that no new action should be required. The trial court should be directed to frame issues and send them to a jury, which is often the case where facts have to be de-

cided in order to aid the court in coming to a proper conclusion. In as much as the court has held that he had a right to intervene in the case and was a proper party, that being settled, the rule that the Equity Court could frame issues to try the questions of facts should necessarily follow. Therefore, I respectfully submit to the court that the decree should be modified so as to allow the court, that tried the case, to pass upon the whole question of title. If the court is of the opinion that this is not proper, then the decree should be modified so as to direct the Equity Court to frame issues and send them to a jury for trial, with the right of the complainants to use the evidence already taken in the case.

Respectfully submitted,

LEO SIMMONS,
Attorney for Appellant.